

The arbitrator found that Lawrence was guilty of negligence and was not satisfied that dismissal was an appropriate sanction. Mutual & Federal was ordered to pay six months' compensation to Lawrence as well as half of Lawrence's performance bonus for 2009.

Aggrieved that the arbitrator did not award reinstatement, Lawrence pursued a review application in the Labour Court. Lawrence argued that the arbitrator failed to determine the issue, failed to make a finding on credibility, disregarded material evidence, failed to consider the provisions of s193(2) of the LRA, and failed to provide reasons for halving Lawrence's performance bonus. Section 193 of the LRA provides inter alia that if an arbitrator, appointed in terms of the LRA, finds a dismissal to be unfair "the arbitrator must require the employer to reinstate or reemploy the employee" unless certain exclusions set out in the LRA are applicable.

The Labour Court held that in this case the test for review was not the well-known Sidumo test. The applicable grounds of review were the grounds set out in s33 of the Arbitration Act, No 42 of 1965 (being misconduct on the part of the arbitrator, gross irregularities in the proceedings, the arbitrator exceeded his/her powers or the award was improperly obtained). The Labour Court dismissed all of Lawrence's grounds of review, upholding only the review relating to his performance bonus.

On appeal to the LAC, Lawrence persisted with his grounds of review.

The LAC held that when parties select an arbitrator as the judge of fact and law, the arbitrator's award is final, irrespective of how erroneous, factually or legally, the decision was. Accordingly, the LAC dismissed Lawrence's first three grounds of review.

On the issue of reinstatement, Lawrence argued that because the parties agreed that the arbitrator had the powers contained in s135 of the LRA (which go to resolving disputes), the arbitrator was also required to apply the reinstatement provisions of s193. The LAC disagreed and held that s193 would only have been applicable if the parties had expressly agreed to it being applicable. The arbitrator only had the powers contained in s135, and no other powers could be ascribed to the arbitrator absent agreement by the parties. Accordingly, the LAC found that the arbitrator had acted in accordance with the terms of reference in the private arbitration agreement and, as such, the appeal had to fail.

If parties wish to select private arbitration, rather than approach the CCMA, they must appreciate that the grounds for reviewing the arbitrator's final award are narrow. Furthermore, the arbitrator will only have the powers that the parties agree to. Whilst private arbitration does bring with it the benefits of control, it also limits the avenues open to a litigant should the award not go in its favour.

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